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No. 09-231

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES BROWN, *et al.*,

Petitioners,

v.

DAVID HOVATTER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Taming the parochial impulses of individual states has been among the nation's chief concerns – and challenges – since the founding. Under the Court's dormant Commerce Clause doctrine, states may neither discriminate against nor unduly burden interstate trade. But states have strong incentives to skirt that doctrine, and they have learned to do so by winking at the letter of the Court's jurisprudence while defying its spirit. That is precisely what Maryland has done in this case, and the Respondents' brief in opposition neither rebuts that fact nor offers any persuasive reason why the Court should not take this opportunity to address an area of critical and increasing confusion among the lower courts.

1. Respondents' lengthy and mostly irrelevant exegesis on the history of funeral regulation in Maryland cannot obscure what the Respondents themselves candidly admitted in their briefing below: namely, that the state's restrictions on corporate ownership of funeral homes have prevented the Maryland funeral industry "from becoming as saturated by national chains as the rest of the national market."[1] Based on its review of the undisputed fact record, which the panel did not challenge even though it applied a different (and erroneous) legal analysis, the district court concluded that the corporate ownership restriction imposes "intolerable and clearly

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[1] Br. of Appellees/Cross-Appellants at 15.

excessive" burdens on the interstate market by "severely limit[ing] the ability of out-of-state businesses from opening a funeral home in Maryland." App. 69.

Thus, Maryland has done precisely what this Court's dormant Commerce Clause doctrine forbids, namely, rendered itself a virtual island in the multi-billion-dollar stream of national funeral commerce. The question is whether this case presents a particularly attractive vehicle for clarifying specific aspects of the Court's dormant Commerce Clause jurisprudence. For the reasons stated in the Petition and briefly summarized below, we believe it does.

2. The Petition should be granted. The panel reached the startling conclusion that commerce-burdening laws are immune from challenge under the dormant Commerce Clause as long as they restrict only the interstate flow of investment capital and services, rather than physical goods. App. 21. Not only does this holding irreconcilably conflict with decisions of this Court and other courts of appeal, but it also raises an issue of extraordinary public importance because an interconnected national economy – which is the touchstone of the Court's dormant Commerce Clause doctrine – will be impossible in the 21st century if states are permitted to erect protectionist barriers to the free movement of capital and services.

The Respondents have no answer to this in their opposition brief. They do not even try to refute the

Petitioners' argument that the Fourth Circuit decision conflicts with *Lewis v. BT Investment Managers, Inc.*, 477 U.S. 27, 38-39 (1980), in which the Court struck down a Florida statute that forbade out-of-state banks from doing precisely what out-of-state funeral businesses want to do here: invest capital and services into a local market.[2] Instead, the Respondents wanly assert that *Lewis* does not really count because it did not technically hold that investment capital and services are articles of commerce for the purposes of the dormant Commerce Clause. Opp. 11.

But that is a distinction without a difference. The reason *Lewis* and a plethora of circuit decisions have never expressly held that investment capital and services are articles of commerce is because it surely never occurred to anyone to doubt that they are. Indeed, the two-judge majority in this case declared *sua sponte* that investment capital and services are not articles of commerce even though no one – Petitioners, Respondents, or the district court – ever raised that possibility, much less briefed it.[3] In this

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[2] Nor do Respondents even try to distinguish the appellate decisions the Petitioners cite, Pet. 11 n. 3, in which the courts of appeal have invalidated local laws that unconstitutionally burden the interstate movement of investment capital or services.

[3] It is hardly surprising that the Respondents do not argue in favor of the panel's misconception here, presumably because they are keenly aware that the Federal Trade Commission minutely regulates purely "local" funeral home operations in contexts that have nothing to do with the physical movement of funeral goods across state lines. *See* 16 C.F.R. § 453.1 *et seq.* If,

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respect, everyone in this case – except two judges on the Fourth Circuit panel – agreed with this Court in *Lewis* that it is so obvious that investment capital and services are articles of commerce that that fact does not even bear mentioning.

Review is further warranted because the panel decision also conflicts with *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and the Respondents' argument on this point illustrates the confusion over what *Exxon* means. According to the Respondents, Opp. 10-11, the panel below, App. 16, and two circuit decisions,[4] *Exxon* stands for the proposition that the dormant Commerce Clause absolutely never, under any conceivable circumstances, applies to laws affecting the "particular structure or method of operation in a market." 437 U.S. at 127.

But that is most emphatically not what *Exxon* says. *Exxon* simply says that showing an impact on

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as the Fourth Circuit held, investment capital and services in the funeral industry truly fall outside the dormant Commerce Clause, then they also necessarily fall outside the affirmative power of Congress to regulate, and those FTC regulations are now unconstitutional in the Fourth Circuit. *See, e.g.*, *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (compiling cases establishing that the dormant and affirmative Commerce Clauses are coextensive).

[4] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001) (car manufacturers forbidden from owning dealerships); *Ford Motor Co. v. Muir*, 874 F.2d 926, 944-45 (3d Cir. 1989) (insurers forbidden from affiliating with savings and loan companies).

how an interstate business operates – without showing anything more – does not violate the Commerce Clause because the Commerce Clause protects the interstate market, not particular businesses or their method of operation in the market. The absolutely critical fact in *Exxon* is that the plaintiffs in that case failed to adduce *any* evidence showing that the challenged law actually burdened interstate commerce, as opposed to just burdening the plaintiffs' businesses. This Court acknowledged in *Exxon* that had the plaintiffs' established that the restrictions on their chosen method of doing business affected the interstate market in petroleum, then the case may have come out differently. 437 U.S. at 126 n.16. Thus, *Exxon* simply stands for the uncontroversial proposition that to prevail on a dormant Commerce Clause claim one must prove a burden on interstate commerce.

Because Respondents do not understand this, they mistakenly claim in their brief in opposition that this Court essentially reaffirmed their incorrect reading of *Exxon* in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 344 (2007). Opp. 11. But that is not true at all. *United Haulers* is exactly like *Exxon* in that there was no proof that interstate commerce was burdened. *Compare United Haulers*, 550 U.S. at 337 ("On remand and after protracted discovery, a Magistrate Judge and District Court found that the haulers did not show that the ordinances imposed *any* cognizable burden on interstate commerce.") (emphasis in original) *with Exxon*, 437 U.S. at 123

("There was . . . no evidence that the total quantity of petroleum products shipped into Maryland would be affected by the statute.").

The panel decision of the Fourth Circuit conflicts with *Exxon* and *United Haulers* because, unlike in those latter cases, the record in this case contains unrebutted evidence of significant burdens on the interstate market for investment capital and services as a direct result of Maryland's restrictions on funeral home ownership by corporations. It is these demonstrable burdens on interstate commerce that trigger the dormant Commerce Clause. The Petitioners are not now claiming, nor have they ever claimed, that they are entitled to relief simply because Maryland's laws affect their preferred way of doing business.[5] The Court should grant review to clarify that restrictions on the structure or form of doing business can in fact violate the dormant Commerce Clause, but only when there is an actual burden on the interstate market and not simply a burden on the plaintiff.[6]

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[5] Professor David Harrington presented unrebutted expert testimony that the rate of investment into Maryland by the national funeral chains is drastically lower than it is in other states while the proportion of locally owned funeral homes is significantly higher than it is in other states. This sort of impact on the interstate market is what the Court said the petroleum companies in *Exxon* needed to prove, but did not, to trigger the dormant Commerce Clause doctrine. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 n.16 (1978).

[6] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90-94 (1987), continues to exacerbate the confusion over *Exxon*

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3. There is even less to say about the circuit split over proper application of the *Pike* test because the Respondents' assertion that the split is nothing more than "an inchoate difference of approach" is both unsupported and entirely unpersuasive. Opp. 10. The point remains that four circuits unambiguously require actual evidence of local benefits under *Pike* and four circuits unambiguously permit unsupported speculation instead. *See* Table inserted at Pet. 22-23 (documenting circuit split).

Moreover, as explained in the Petition, the panel below certainly did not "follow[ ] this Court's precedents" in applying *Pike* to the challenged restrictions. Opp. 11. To the contrary, the panel not only credited asserted local benefits that were "no more than entirely speculative," App. 65-66 (internal quotations and citation omitted), but it never even mentioned the third and final step of the *Pike* test, which asks whether the state could have achieved its objectives as well "with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142. Indeed, so substantial was the panel's departure from *Pike* that it actually created an intra-circuit split by accepting, for the first time in Fourth Circuit history, purely speculative local benefits for which no actual evidence was offered. *Compare* App. 23-24 (not

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because that decision seemingly invoked *Exxon* for the erroneous proposition that state regulation of the form or structure of doing business are in fact outside the Commerce Clause. But, as noted above, that is not what *Exxon* says.

identifying any evidence that Maryland funeral home owners demonstrate "greater familiarity" with the day-to-day workings of their businesses or are actually "more accountable" to regulators) *with Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *Medigen of Ky., Inc. v. Public Serv. Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993) (all striking down state laws on basis of government's failure to provide actual evidence of local benefits or absence of less burdensome means).

The brief in opposition does not remotely challenge the fact that there is disarray among and within the circuits over a very basic, very important question: does the *Pike* test have any independent force or has it simply become rational basis review by another name? There are four circuits on one side of that question, four circuits on the other, and at least three that appear to vacillate, including the Fourth Circuit. *See* Table at Pet. 22-23. It seems unlikely that more disarray in the circuits will shed more light or meaningfully assist the Court in resolving what has crystallized into an admittedly difficult, but nevertheless perfectly clear, question of constitutional law.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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